No. 06-1284

In The

Supreme Court of the United States

USF-RED STAR EXPRESS, INC.,

Petitioner

v.

EDWIN B. TAYLOR

Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ralph Lamar, Esquire
141 Spruce Lane
Collegeville, PA 19426
610-831-5181

Lorrie McKinley, Esquire
Counsel of Record
McKinley & Ryan, LLC
16 W. Market Street, 3rd Floor
West Chester, PA 19382
610-436-6060

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Third Circuit's unpublished opinion below properly affirm a jury instruction in a trial pursuant to the Americans with Disabilities Act (ADA), which defined "major life activities" as activities an average person can perform with little or no difficulty," such as caring for one's self, walking, breathing, seeing, hearing, and working," and in which the jury was asked to consider only whether the plaintiff had proved that Red Star regarded him as substantially limited as to his ability to care for himself, walk, breathe, see, hear, or work?

2. Did the Third Circuit properly affirm the District Court's denial of a new trial where the jury concluded that Plaintiff had proved by a preponderance of the evidence that Red Star regarded him as having a substantial limitation in one or more of the major life activities of caring for one's self, walking, breathing, seeing, hearing, and working?

3. Did the Third Circuit properly affirm the District Court's affirmance of a jury verdict against Red Star when the jury concluded "that Red Star's erroneous perceptions that Mr. Taylor had a disability as defined by the ADA was not the result of any misinformation provided to the company by the plaintiff," and that Red Star's perceptions and its adverse

actions against the plaintiff were "not founded on reliable medical evidence as to the nature of the risk, the duration of the risk, the severity of the risk, and the probabilities that the disability will cause harm?"

4. In this direct evidence case, did the Third Circuit properly affirm the District Court's jury instruction that Red Star prevented the plaintiff from returning to work based on his medical condition when Red Star admitted that but for the plaintiff's medical condition there would have been no adverse action, and further admitted that it would not permit the plaintiff to return to work without an unqualified medical clearance?

5. Did the Third Circuit properly conclude that Respondent's Motion for Supplemental Attorneys fees was timely under F.R.C.P. 54 (a)(2)(B) when that motion, filed April 20, 2005, pre-dated the District Court's April 27, 2005 disposition of his original motion for attorneys fees by seven days?

TABLE OF CONTENTS

Page

Counterstatement of the Questions Presented for Review i

Table of Contents iii

Table of Authorities v

Statutory Provisions Involved xi

Counterstatement of the Case 1

Factual Background and the Proceedings Below..... 2

Reasons for Denying the Writ..... 7

A. Based on This Court's Opinion in *Toyota v. Williams,* Red Star Requested the Jury Instruction The District Court Gave as to What Constitutes a Major Life Activity Under the ADA; That Instruction Was Fully In Accord with *Williams* and was Properly Affirmed By the Third Circuit 7

B. There Is No "Circuit Split" As To What Proof An ADA Plaintiff Must Adduce To Prove An Actual vs. A Perceived Disability... 12

TABLE OF CONTENTS - Continued

Page

C. The Jury Found That Mr. Taylor Was Not Responsible for Red Star's False Perception Of His Medical Condition, and There Is No Factual Predicate For A Limited Reasonability Defense 16

D. The Third Circuit Correctly Affirmed The District Court's Direct Evidence Jury Instruction That Red Star's Adverse Action Against Mr. Taylor Was Based on His Medical Condition, But That Red Star Did Not Believe That Mr. Taylor was Qualified..... 20

E. There is No Circuit Split Between The Third Circuit And The Second As to the Application of F.R.C.P. 52..... 24

Conclusion 27

TABLE OF AUTHORITIES

Page

CASES

Bernback v. Greco, No. 05-4642, 2007 WL 108293 (3rd Cir. Jan. 16 2007)..... 25

Best v. Shell Oil Co., 107 F.3d 544 (7th Cir. 1997)..... 19

Bragdon v. Abbot, 524 U.S. 624(1999)..... 17

Breitkruetz v. Cambrex Charles City, Inc., 450 F.3d 780 (8th Cir. 2006)..... 17, 18

Deane v. Pocono Medical Center, 142 F.3d 138 (3rd Cir. 1998)..... 12

EEOC v. Kinney Shoe Co., 917 F. Supp. 419, *aff'd,* 104 F.3d 683 (4th Cir. 1997)..... 13

EEOC v. Schneider National Inc., No. 06-3108, 2007 U.S.App. LEXIS 654 (7th Cir., March 21, 2007)..... 18

TABLE OF AUTHORITIES - Continued

Page

EEOC v. Sears & Roebuck Co., Inc., 417 F.3d 789 (7th Cir. 2005)..... 10

EEOC v. Yellow Freight, 2002 U.S. Dist. LEXIS 16826 (2002)..... 5

Emory v. Astra-Zeneca Pharmaceuticals LP, 401 F.3d 174 (3d Cir. 2005)..... 11

Gillen v. Fallon Ambulance Services, Inc., 283 F.3d 11 (1st Cir. 2002)..... 18

Heise v. Genuine Parts Co., 900 F. Supp. 1137 (D. Minn. 1995)..... 5

Henderson v. Ardco, 247 F.3d 645 (6th Cir. 2001)..... 5

Hendricks-Robinson v. Excel Corp., 154 F.3d 685 (7th Cir. 1998)..... 5

Holiday v. City of Chattanooga, 206 F.3d 637 (6th Cir. 2000)..... 19

Hutchinson v. United Parcel Serv., Inc., 883 F. Supp. 379 (N.D. Iowa 1995)..... 5

Lowe v. Alabama Power Co., 244 F.3d 1305 (11th Cir. 2001)..... 19

TABLE OF AUTHORITIES - Continued

Page

McGregor v. National R.R. Passenger Corp., 187 F.3d 1113 (9th Cir.1999)..... 5

Norris v. Allied-Sysco Food Servs., Inc., 948 F. Supp. 1418 (N.D. Cal. 1996), *aff'd*, 191 F. 3d 1043 (9th Cir. 1999), *cert. denied*, 528 U.S. 1182 (2000)..... 5

Ollie v. Titan Tire Corp., 336 F.3d 680 (8th Cir. 2003)..... 19

Ottig v. J.C. Penny, 223 F.3d 704 (8th Cir. 2000)..... 13

Pittari v. American Eagle Airlines, Inc., 468 F.3d 1056 (8th Cir. 2006)..... 17, 18

Reeves v. Sanderson Plumbing, Inc., 530 U.S. 133, (2000)..... 16

Reimer v. Illinois DOT, 148 F.3d 800 (7th Cir. 1998)..... 19

Sarsycki v. United Parcel Service, 862 F. Supp. 336 (W.D. Okla. 1994)..... 5

Sutton v. United Airlines, Inc., 527 U.S. 471 (1999)..... 14

TABLE OF AUTHORITIES - Continued

Page

Tancredi v. Metro Life Ins. Co, 378 F.3d 220 (2d Cir. 2004), *cert. denied,* 539 U.S. 942 (2003) 25, 26

Taylor v. Pathmark, Stores, Inc., 177 F.3d 180 (3rd Cir. 1999)..... 12, 16

Taylor v. Phoenixville School Dist., 184 F.3d 296,(3rd Cir. 1999)..... 19

Tice v. Centre Area Transportation Authority, 247 F.3d 506 (3rd Cir. 2001)..... 12

Toyota Manufacturing Co. v. Williams, 534 U.S. 184 (2002)..... iii, 7, 8, 10

Warmsley v. MTA-NYCTA, 308 F. Supp. 2d 114 (E.D.N.Y. 2004)..... 5

Weigel v. Target Stores, 122 F.3d 461 (7th Cir. 1997)..... 5

Weyant v. Okst, 198 F.3d 311 (2d Cir. 1999)..... 25, 26

TABLE OF AUTHORITIES - Continued

Page

FEDERAL STATUTES

Americans with Disabilities Act

42 U.S.C. §12101 1

42 U.S.C. 12101 (9) 19

42 U.S.C. § 12111 (3) 20

42 U.S.C. § 12111 (8) xi

42 U.S.C.§ 12112 (a) xi

42 U.S.C. § 12112 (b)(5)(A) ..... xi, 5

42 U.S.C. § 12113 (b) 22

42 U.S.C. § 12119(9) 5

TABLE OF AUTHORITIES - Continued

Page

FEDERAL RULES AND REGUALTIONS

29 C.F.R. § 1630.2(i)..... 11

29 C.F.R. § 1630.2(j)(3)(i)..... 14

42 C.F.R. § 404. 1525-30 Appendix 1, (2002)..... 14

F.R.C.P. 52.....iv, 1, 2, 24

F.R.C.P. 54 (a)(2)(B)..... ii

F.R.C.P. 54(d)(2)..... 26

MISCELLANEOUS AUTHORITIES

H.R. Rep. No. 101-485 (II) at 73, 1990
U.S.C.C.A.N. at 356..... 18

Social Security Rules-87-6: Titles II and XVI..... 14

STATUTORY PROVISIONS INVOLVED

Red Star omits these critical provisions of the Americans with Disabilities Act from its Petition:

42 U.S.C. § 12111 (8): The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires....".

42 U.S.C.§ 12112 (a): No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112 (b)(5)(A): As used in subsection (a) of this section, the term discriminate includes: not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

In this case under the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.*, (ADA), the jury found that Edwin B. Taylor, the Respondent herein, suffered illegal employment discrimination when the Petitioner, USF-Red Star Express, Inc., refused to permit him to return to work in any capacity on its loading dock for more than twenty months after he suffered two non-epileptic seizures in March, 2001. The company took this action due to its false perception that Mr. Taylor was a "severe epileptic" who would be a hazard in the workplace "no matter what he was doing" and *"regardless what the medical evidence might show."* JA332; 1669.

The Third Circuit's unpublished opinion below does not, as Red Star histrionically claims, create a Circuit split as to either the statutory interpretation of the ADA or the application of Rule 52 of the Federal Rules of Civil Procedure to motions for supplemental attorneys fees.[1] The Third Circuit's opinion is factually driven and firmly ensconced in the jurisprudence which this Court has adopted for the disposition of claims of employment discrimination pursuant to the ADA. It does not diverge even slightly into uncharted areas of public policy. Moreover, the opinion is not precedential. As such, it is not binding even in the Third Circuit, and is highly unlikely to have any persuasive impact

---

[1] The Third Circuit's unpublished opinion in this case is reprinted in the Appendix to Red Star's Petition at App. 1-22.

on any of the other Circuits.[2]

These factors, standing alone, make this case an inappropriate vehicle for further delineating the parameters of the ADA. Likewise, the Third Circuit's application of Rule 52 of the Federal Rules of Civil Procedure to Mr. Taylor's claim for supplemental attorneys fees, which was filed seven days *before* the District Court ruled on his initial fee motion and within the time the District Court directed, is record-based, devoid of policy implications, and completely consistent with the decisions from the Second Circuit upon which Red Star attempts to base its claim of a "Circuit split."

Red Star's arguments lack the necessary factual predicate to make them applicable to this case, and there is no reason for this Court to consider the legitimacy of defenses which are inapposite to the facts before it. Accordingly, Red Star's Petition should be denied.

FACTUAL BACKGROUND AND THE PROCEEDINGS BELOW

Red Star's petition is based disingenuously on a number of facts which were disputed at trial and upon which the jury found for Mr. Taylor, *not* Red Star. Most significantly, Red Star's proposed "safety" defenses all emanate from the notion that Mr. Taylor, as a "combination

---

[2] According to the Third Circuit's Internal Operating Procedures, "Unprecedential Opinions" have value only to the trial court and the parties; the Court deems such opinions to be devoid of "precedential or institutional value." Third Circuit Internal Operating Procedures, Rule 5.2 and 5.3.

man,"[3] was required to drive a truck and/or operate a fork lift. Although at the time Mr. Taylor suffered his seizures he ordinarily exercised his seniority to drive commercial trucks,[4] it is undisputed that he was not required to do so: he had enough seniority to secure work o. the loading dock whenever he wanted it. JA177;1595-99; 1600-06.

Throughout the relevant time period Mr. Taylor had a medical release to manually load and unload trucks on Red Star's loading dock.[5] Although Red Star argued to the jury that operating a fork lift was an essential function of the dock job, the jury found to the contrary.[6] Numerous dock workers

---

3 "Combination men" at Red Star drove trucks and worked on the loading dock. They secured their job assignments through bids which were allocated according to seniority. JA174. By contrast, "dock workers" at Red Star worked on the dock only. Red Star stipulated that dock workers do not drive trucks and are not required to have a license to do so. *See* Admission No. 6, JA254; *see also* JA314; 334. Red Star has approximately 25 dock workers who do not have commercial drivers licenses. JA183.

4 Mr. Taylor's seizures in March, 2001 were an isolated event caused by his use of a vitamin supplement called "creatine." JA 699; 1703.

5 JA 351; 427; 595; 627; 1595-99; 1600-1606.

6 The jury answered *"YES"* to the following question:

> "DO YOU FIND THAT THE PLAINTIFF HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT HE WAS QUALIFIED TO PERFORM THE ESSENTIAL FUNCTIONS OF HIS JOB AS A COMBINATION MAN OR DOCK WORKER AT USF-RED STAR WITH OR

testified that operating a fork lift was not essential; that Red Star gave them the discretion to load and unload trucks as they saw fit, with or without a fork lift; that much of Red Star's freight ~~had to be~~ moved *without* a fork lift; and that during the relevant time period less senior men than Mr. Taylor spent their time loading and unloading manual freight without using a fork lift. JA160-69; 181; 719-735. Red Star did not appeal from the jury's critical factual conclusion *against Red Star* that fork lift operation was *not* an essential function of the dock worker position, and the Third Circuit did not address it.

Because the jury concluded that operating a fork lift was not an essential function of the job to which Mr. Taylor requested to return, the other critical factual predicate for Red Star's appeal – that it only kept Mr. Taylor off the job because "the doctors" did not release him to return to work on a fork lift -- is inapposite. It is also false. Red Star repeatedly and by its own admission rejected numerous medical releases from Mr. Taylor which imposed no restrictions whatsoever on his ability to handle manual freight on Red Star's loading dock – indeed, it affirmatively

---

> WITHOUT A REASONABLE ACCOMMODATION?"

JA1497. Likewise, the jury said *"YES"* when it was asked:

> "DO YOU FIND THAT PLAINTIFF HAS PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT ANY ACCOMMODATION HE [PLAINTIFF] SOUGHT WOULD HAVE ENABLED HIM TO PERFORM THE ESSENTIAL FUNCTIONS OF THE COMBINATION MAN OR DOCK WORKER JOB, AND THAT ANY SUCH ACCOMMODATION WAS REASONABLE?"

JA 1449.

hid Mr. Taylor's medical evidence from its own doctor for more than a year,[7] and refused to permit him to work on the dock even after he had been fully released to operate *both* a fork lift *and* a truck.[8] Indeed, Red Star refused to consider Mr. Taylor's return to return to work in any capacity until he could do so without *any* restrictions whatsoever.[9] *C.f.*, 42 U.S.C. §12119(9); 12112(b)(5)(A) (requiring employers to provide accommodations to qualified persons with disabilities unless such accommodations would produce "undue hardship").

---

[7] JA487-493.

[8] JA 1638; 1641; 1650.

[9] JA174; 183; 311; 326; 351; 382-89; 425; 877-78; 880;993."Full-duty" release requirements such as the one Red Star used here to deny employment to Mr. Taylor violate the ADA, as every federal court to address the issue has confirmed, because they do not allow a case-by-case assessment of an individual's ability to perform essential functions of the individual's job, with or without accommodation. *See e.g., EEOC v. Yellow Freight,* 2002 U.S. Dist. LEXIS 16826 (2002)(collecting cases). *Accord Henderson v. Ardco,* 247 F.3d 645, 653 (6th Cir. 2001*)*; *McGregor v. National R.R. Passenger Corp.,* 187 F.3d 1113, 1116 (9th Cir. 1999) (collecting cases). *Hendricks-Robinson v. Excel Corp.,* 154 F.3d 685, 699 (7th Cir. 1998); *Weigel v. Target Stores,* 122 F.3d 461, 466 (7th Cir. 1997); *Hutchinson v. United Parcel Serv., Inc.,* 883 F. Supp. 379, 397 (N.D. Iowa 1995); *Warmsley v. MTA-NYCTA,* 308 F. Supp. 2d 114 (E.D.N.Y. 2004); *Norris v. Allied-Sysco Food Servs., Inc.,* 948 F. Supp. 1418, 1437 (N.D. Cal. 1996), *aff'd* 191 F.3d 1043 (9th Cir. 1999), *cert. denied,* 528 U.S. 1182 (2000); *Heise v. Genuine Parts Co.,* 900 F. Supp. 1137, 1154 & n.10 (D. Minn. 1995); *Sarsycki v. United Parcel Service,* 862 F., Supp. 336, 341 (W.D. Okla. 1994).

Red Star's actions were premised upon its exaggerated and intractable misconceptions as to the nature and severity of Mr. Taylor's isolated seizures and its unfounded assumptions that he had epilepsy which was so "severe" and "uncontrolled" and that he "could have a seizure at any moment." JA30; 271; 279; 332; 409; 563; 566; 729; 860; 883; 891; 1612; 1669. Although Red Star contended that its misconceptions concerning Mr. Taylor's seizures and their functional impact were due to misrepresentations Mr. Taylor made to the company, the jury specifically found to the contrary.[10] Indeed, the jury accepted the plethora of record evidence that Red Star's erroneous assumptions regarding Mr. Taylor's medical condition derived from its own disregard of objective medical evidence, and its unreasonable reliance on the opinion of a company doctor who never saw Mr. Taylor and who, by his own admission, was not competent to evaluate

---

[10] The jury answered *"NO"* to the following query:

> "DO YOU FIND THAT THE DEFENDANT HAS PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT PLAINTIFF MISINFORMED DEFENDANT ABOUT HIS MEDICAL CONDITION, AND THAT THE DEFENDANT EVALUATED THE IMPAIRMENT AND MADE AN INFORMED JUDGMENT BASED ON RELIABLE MEDICAL EVIDENCE AS TO HOW, IF AT ALL, THE IMPAIRMENT WOULD IMPACT THE PLAINTIFF'S JOB?"

JA1448. Thus, Red Star is estopped from arguing here that Mr. Taylor "perjured" his EEOC charge and otherwise misled Red Star as to the true nature of his medical condition.

the medical evidence in any event. JA487; 509.[11] Red Star admitted, in fact, that its position was fixed "regardless of what current medical evidence shows. JA1669. Indeed, Red Star vowed not to allow Mr. Taylor back to work until a federal judge forced it to do so. JA00164; 239; 411; 908; 981.[12]

REASONS FOR DENYING THE WRIT

A. Based on This Court's Opinion In *Toyota v. Williams*, Red Star Requested the Jury Instruction The District Court Gave as to What Constitutes a Major Life Activity Under the ADA; That Instruction Was Fully In Accord with *Williams* and was Properly Affirmed By the Third Circuit

Red Star never asked the District Court to instruct the

---

[11] JA311; 326; 351; 382-89; 425; and 1001.

[12] The Jury said "*NO*" to the following question:

> "DO YOU FIND THAT THE DEFENDANT TOOK ITS ACTIONS TOWARD MR. TAYLOR ONLY AFTER IT WAS WELL INFORMED IN THE LIGHT OF CURRENT OBJECTIVE MEDICAL KNOWLEDGE CONCERNING THE MEDICALLY ACCURATE NATUREE OF THE RISK, THE DURATION OF THE RISK, THE SEVERITY OF THE RISK, AND THE PROBABILITIES THAT THE DISABILITY WILL CAUSE HARM?

JA1448.

jury that major life activities under the ADA are those activities which are of "central importance" to a person's daily life. In fact, the District Court gave the *exact instruction* Red Star *requested.*[13] Curiously, Red Star's authority for its proposed charge was *Toyota Manufacturing Co. v. Williams,* 534 U.S. 184, 197 (2002), the same case it now insists the District Court misapplied in charging the jury.

The Court's instruction on its face belies Red Star's complaint that the jury was led to conclude that activities which are *not* central to a person's daily life might qualify as "major" life activities for purposes of determining coverage under the ADA, and the Third Circuit properly affirmed it.[14]

---

[13] Charge Number Nine of Defendant's Second Revised Proposed Points for Charge, October 6, 2004, Docket No. 66 at 11 (JA 1915).

[14] Red Star simplistic attack on the District Court's instruction regarding what constitutes a "major life activity" under the ADA is based upon a single phrase of the total instruction taken out of context. For the sake of clarity, the Court explained the concepts "major life activity" and "substantially limits" separately as follows:

> *Now the phrase "major life activity" means an activity that an average person can perform with little or no difficulty. Examples are caring for one's self, walking, breathing, seeing, hearing, and working. Mr. Taylor claims that USF-Red Star perceived him as having epilepsy or a seizure disorder, which substantially limited his major life activities of walking, breathing, caring for himself, remaining conscious and/or working and that it so classified him without a factual foundation.*
>
> *Now merely driving a forklift or truck is not a major life activity.*

To find that USF-Red Star regarded Mr. Taylor as having a impairment, which substantially limited the major life activity of working, Plaintiff must prove that USF-Red Star believed that Mr. Taylor had an impairment which restricted his ability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person, having comparable training, skills and abilities. The inability to perform one type of job, a specialized job, or a particular job of one's choice, does not necessarily mean that one is substantially limited in the major life activity of working.

Now the phrase "substantially limits" means that Mr. Taylor was misclassified as, or was regarded as, being unable to perform one or more major life activities or significantly restricted as to the condition, manner, or duration under which he could perform at least one major life activity. The following factors are relevant in determining whether an individual is substantially limited in a major life activity: First, the perception of the nature and severity of the impairment; secondly, the perception of the duration or expected duration of the impairment; and three, the perception that the impairment would have a permanent or long term impact.

JA 1416. The Court went to explain:

Now merely driving a forklift or truck is not a major life activity. To find that USF-Red Star regarded Mr. Taylor as having a impairment, which substantially limited the major life activity of working, Plaintiff must prove that USF-Red Star believed that Mr. Taylor had an impairment which restricted his ability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person, having comparable training, skills and abilities. The inability to perform one type of job, a specialized job, or a particular job of one's choice, does not necessarily mean that one is substantially limited in the major life activity of working.

Now the phrase "substantially limits" means that Mr. Taylor

Indeed, the jury questionnaire asked only whether Mr. Taylor had proved by a preponderance of the evidence whether Red Star perceived him as substantially limited in "*the* major life activities of *walking, breathing, caring for himself, remaining conscious, and/or working in either a class of jobs or a or a broad range of jobs in various classes*". By any definition of the term, the life activities the District Court specifically asked the jury to consider constitute "major life activities" to which the ADA is indisputably directed.[15]

> *was misclassified as, or was regarded as, being unable to perform one or more major life activities or significantly restricted as to the condition, manner, or duration under which he could perform at least one major life activity. The following factors are relevant in determining whether an individual is substantially limited in a major life activity: First, the perception of the nature and severity of the impairment; secondly, the perception of the duration or expected duration of the impairment; and three, the perception that the impairment would have a permanent or long term impact.*

JA1417. Red Star does not accuse the District Court of incorrectly defining the term "substantially limits."

[15] Red Star misperceives what was at issue in *Toyota* and the limited scope of this Court's holding. The *only* issue the Court addressed was whether the plaintiff had adduced sufficient evidence that she was *actually* and substantially limited in the major life activity of *performing manual tasks*. As to *that* major life activity, the impairment must prevent or severely restrict the plaintiff from performing manual tasks which are central to most people's daily lives. 534 U.S. at 195. The Court never said or suggested that this is the standard for ascertaining whether an impairment substantially limits any other major life activity. As numerous Circuit Courts have recognized, the indicia of importance to everyday life which the Supreme Court considered in connection with Ms. Williams' claim that she was substantially limited in performing manual tasks would be of little relevance in analyzing other major life

Thus, contrary to Red Star's complaints, the Third Circuit has not endorsed a "new definition" of what constitutes a major life activity for purposes of the ADA. If anything, the District Court's definition was overly restrictive, as one may qualify as having a substantial limitation in a major life activity even if the activity impacted by the disability is not one of those the Court enumerated. 29 C.F.R. § 1630.2(i).

Even if the District Court did err by omitting the phrase "central to most people's daily lives" from its instruction as to what constitutes a major life activity, the error was harmless. Red Star, after all, invited the same instruction that the District Court gave. Moreover, all of the examples that the District Court provided the jury as to what constitutes major life activities *are* central to most people's daily lives. The Court's instruction left no room for the jury to conclude that it was free to find liability based on activities other than the five it identified, and there is no evidence that it did.[16]

---

activities. *See eg., EEOC v. Sears & Roebuck Co., Inc.*, 417 F.3d 789 (7th Cir. 2005). As to the major life activity of performing manual tasks, the Third Circuit has required plaintiff to prove substantial limitation as to activities of central importance to most people's daily lives. *Emory v. Astra-Zeneca Pharmaceuticals LP*, 401 F.3d 174, 181 (3d Cir. 2005).

16 Additionally, the evidence at trial demonstrated overwhelmingly that Red Star's perception of Mr. Taylor's condition was significantly more restrictive than it had to be to bring him within the coverage of the ADA. Red Star admitted that it perceived Mr. Taylor to be incapable of walking, breathing, caring for himself, and remaining conscious during a seizure, and it feared that this could occur at unpredictable intervals. Unrebutted testimony from Mr. Taylor's vocational expert established that Red Star's perceptions of Mr. Taylor's condition, if true, would not

B. There Is No "Circuit Split" As To What Proof An ADA Plaintiff Must Adduce To Prove An Actual vs. A Perceived Disability

Nothing in the opinion below creates a "Circuit split" as to the standard of proof for "regarded as" plaintiffs. The Third Circuit has never, in this or any other case, stated or implied that an ADA plaintiff can claim coverage under the perception prong of the Act without proving that the employer regards him as having a disability which substantially limits one or more major life activities. *E.g., Tice v. Centre Area Transportation Authority,* 247 F.3d 506 (3rd Cir. 2001); *Taylor v. Pathmark, Stores, Inc.*, 177 F.3d 180 (3rd Cir. 1999); *Deane v. Pocono Medical Center,* 142 F.3d 138 (3rd Cir. 1998). There is simply no "Circuit split" to resolve.

Even if this Court were to re-iterate what the Courts of Appeal, including the Third Circuit, already agree unanimously to be the standard of proof for "regarded as" claims, the factual record here would command the same result which the Third Circuit affirmed below. Whether Red Star perceived Mr. Taylor as having a disability in one or more major life activities was a question of fact for the jury, and the evidence that it did so was overwhelming. Throughout the relevant time period, Red Star's managers

---

only have significantly restricted his vocational opportunities, but would have virtually eliminated them altogether. JA563-573; 619; 677-79. Thus, even if the jury had been instructed to consider whether Red Star perceived Mr. Taylor to have a substantial limitation in a major life activity of central importance to most people's daily lives, the jury would still have concluded that the company regarded him as having a disability under the ADA.

insisted with absolute certainty (albeit absolutely erroneously) that Mr. Taylor was an "epileptic" who was "seizure prone" and subject to "sudden and unpredictable losses of consciousness." JA883; 1568. Without a shred of medical evidence, Red Star believed that Mr. Taylor had " an established history of epilepsy," ... an "epileptic (convulsive, loss of consciousness) condition ..... There is no disputing this basic medical fact." JA1581-2. Based on its unfounded assumptions regarding seizures and epilepsy, Red Star thought that Mr. Taylor could "have a seizure at any moment." JA309; 313. Red Star insisted that its erroneous and medically unsupported conclusion was "simple, irrefutable, inescapable, and undisputed." *Id.* "[A]ny sixth grader," according to Red Star, would see its point that Mr. Taylor was unqualified for any job in the company. JA 310; 883; 332; 886; 1669-74.[17]

The jury had more than an adequate factual basis to conclude that, if true, Red Star's perceptions would have substantially limited one or more of Mr. Taylor's major life activities. He would have been unable to go out of his home

---

[17] Red Star's citations to cases in which Courts and juries conducted an individualized inquiry and concluded that the plaintiff did not have a disability are inapposite. Although a person with epilepsy or a seizure disorder may not be in a perpetual seizure state, a jury could still conclude that their major life activities are substantially limited, especially if their condition is so unstable that they "could have a seizure any moment." *See Ottig v. J.C. Penny,* 223 F.3d 704 (8th Cir. 2000) (plaintiff with epilepsy which is uncontrolled, episodic, and unpredictable, and who is entirely incapable of numerous major life activities when a seizure is underway, has a disability under the ADA, regardless of work restrictions); *EEOC v. Kinney Shoe Co.,* 917 F. Supp. 419, *aff'd,* 104 F.3d 683 (4th Cir.1997).

unattended, travel independently, care for his children, cross a street, or perform most other activities of daily life without supervision because the consequences of having a seizure "at any moment" might have placed him in harm's way without the ability to protect himself from serious danger or death.[18] Red Star admits that this was why it did not even investigate whether it could accommodate Mr. Taylor in a clerical job or other in a non-forklift capacity on the dock. JA192-3; 331-32; 341; 675; 880; 917; 1632. *See also* Memorandum and Order dated March 8, 2005, App. 23, 28.

The Third Circuit, like the jury, had this and far more, to support its conclusion that Red Star's erroneous perception of Mr. Taylor's medical condition fell within the parameters of the ADA. Red Star fails to mention in its Petition that the jury had voluminous evidence, including *unrebutted expert testimony*, that if Mr. Taylor's condition was as unstable and as random as Red Star thought it was, (however erroneously), he would have been disqualified from several classes of jobs as well as numerous jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i); *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999); *see also* JA563-573; 677-8. Red Star's Brief does not even acknowledge the existence of this expert testimony, let alone explain why it does not render this Petition utterly frivolous.

---

[18] Persons with epilepsy who are impaired at this level equal or exceed the requirements of the Social Security Administration for Disability Insurance Benefits. *See* SSR-87-6: Titles II and XVI: The Role of Prescribed Treatment in the Evaluation of Epilepsy; 42 C.F.R. § 404.1525-30 Appendix 1, (2002).

The expert's opinion that Red Star's perceptions significantly impeded Mr. Taylor's vocational opportunities, or eliminated them altogether, provided the jury with a solid evidentiary basis to conclude that Red Star regarded him as substantially limited in the major life activity of working, at the very least. According to the expert, if it were true that Mr. Taylor's seizure condition was so random that he could "have a seizure any minute", this would mean *total vocational disability* for Mr. Taylor. JA573. Even if Red Star only perceived that Mr. Taylor could not operate a fork lift or drive a truck, the vocational impact would have been devastating: it would have rendered Mr. Taylor ineligible for practically every job for which he was ever qualified by training and experience, including the entire class of truck driving jobs, all jobs involving material handling or movement, dock working, production jobs, and all jobs that require the ability to operate and control equipment, whether or not it moves or is stationary. JA563-567.

Although the jury was not compelled to accept this evidence, it had more than a sufficient basis to conclude that Red Star regarded Mr. Taylor as having a disability in one or more of his major life activities. The Third Circuit required Mr. Taylor to meet the evidentiary threshold which the ADA clearly directs, and concluded, based on the factual record before it, that he did so. There is no reason for this Court to burden itself with an academic exercise in which the conclusion is foreordained and undisputed by the Courts of Appeal and ADA litigants on both sides of the bar.

C. The Jury Found That Mr. Taylor Was Not Responsible for Red Star's False Perception Of His Medical Condition, and There Is No Factual Predicate For A Limited Reasonability Defense

Red Star seeks this Court's imprimatur for a complete defense under the ADA when an employer reasonably but mistakenly believes an employee to be disabled and denies him employment on that basis. Ironically, the Third Circuit has adopted a "limited reasonability defense" which provides relief for employers who erroneously regard an employee as having a disability if they rely on misinformation provided by the employee. *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 192 (3rd Cir. 1999). Mr. Taylor does not challenge the legitimacy of this doctrine.

Red Star seeks this Court's intervention in what it claims to be a "pairing [sic] back of the reasonable mistake defense." Petition at 21. A Circuit Court's departure from its own precedent is not a basis for a petition for certiorari to this Court. Even if it were, the Third Circuit in no way indicated that its support of the limited reasonability defense was on the wane. It merely acknowledged the obvious, that the jury had an adequate factual basis for concluding that Red Star, not Mr. Taylor, was responsible for its own false perceptions. App. 12, *citing, Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 150-51 (2000).[19] It could hardly have

---

[19] *See also* Memorandum and Order dated March 8, 2005, App. at 28: "There was conflicting evidence on this issue and the jury clearly

done otherwise when Red Star's own witnesses admitted adhering to their baseless perceptions "regardless of what current medical evidence shows." JA1669. There is no reason for this Court to consider the parameters of a limited reasonability defense where, as here, there is no factual predicate to which it could be applied. The jury weighed and rejected the claim that Mr. Taylor misled Red Star into a false understanding as to the nature and extent of his medical condition. JA1448.

Red Star's perseverative effort to create yet another "Circuit split" is devoid of any support whatsoever. Even if a single unprecedential opinion from a Court of Appeals could create a "split" with another Circuit that merits this Court's attention, there is no such thing here. Neither of the cases Red Star cites from the Eighth Circuit, *Breitkruetz v. Cambrex Charles City, Inc.*, 450 F.3d 780 (8th Cir. 2006) and *Pittari v. American Eagle Airlines, Inc.*, 468 F.3d 1056 (8th Cir. 2006), is remotely similar to this one.[20] Nothing in either of those cases suggests that an employer's reliance on medical advice provides a defense to an ADA claim if that reliance is unreasonable, or is otherwise inconsistent with current, objective, and reliable medical evidence.[21] In stark contrast to

---

resolved the conflict in favor of the Plaintiff."

[20] The fact that the Third Circuit found *Pittari* to be factually inapposite does not create a legal split between the Third and the Eighth Circuits. App. 6 n.1

[21] *Cf. Bragdon v. Abbot*, 524 U.S. 624, 650 (1999)(emphasizing that "courts should assess the objective reasonableness of health care professionals without deferring to their individual judgments"). *See also*

what happened here, the employers in *Pittari* and *Breitkruetz* based their decisions upon objective medical evidence which derived from an *actual examination of the plaintiff*.[22] Red Star, however, relied on the medical advice of a company doctor who never set eyes on Mr. Taylor until the day he testified in federal court, and from whom Red Star's management hid objective medical evidence as to Mr. Taylor's actual condition for more than a year.

The Courts of Appeals, including the Third Circuit, agree that the ADA provides no defense to an employer who deprives employment to an individual based upon its own disregard for objective medical evidence, and who "slavishly defers" to the opinion of a doctor who has never seen the plaintiff or who otherwise does not have all the facts. *Gillen v. Fallon Ambulance Services, Inc.*, 283 F.3d 11, 31 (1st Cir.

H.R. Rep. No. 101-485 (II) at 73, 1990 U.S.C.C.A.N. at 356 ("any determination by a company physician can be challenged by evidence from the complainant's physician. Company doctors are often unfamiliar with disabilities and assume that there are barriers to employment which in fact do not exist")

22 The recent Seventh Circuit decision in *EEOC v. Schneider National Inc.*, No. 06-3108, 2007 U.S. App. LEXIS 654 (7th Cir., March 21, 2007) is no different. There, the Court determined that the employer's decision to terminate the plaintiff due to the potential impact of his "neurocardiogenic syncope" was based on objective medical evidence. Contrary to what Red Star did here, the employer did not base its decision on an "unexaggerated" assessment as to the nature of the impairment, and its perceptions as to how the impairment impacted the plaintiff would not have (if true) substantially limited any major life activity. The company regarded the plaintiff as being unfit for a single, specific job and no more.

2002). *Accord Taylor v. Phoenixville School Dist.,* 184 F.3d 296, 309 (3rd Cir. 1999) (employer does not reasonably rely upon a medical expert opinion based on a single office visit several years after the employment decision); *Holiday v. City of Chattanooga,* 206 F.3d 637, 645 (6th Cir. 2000)("[c]ourts need not defer to an individual doctor's opinion that is neither based on the individualized inquiry mandated by the ADA nor supported by objective scientific and medical evidence"); *Best v. Shell Oil Co.,* 107 F.3d 544 (7th Cir. 1997)(employer faces liability for relying on its unsupported doctor's report); *Reimer v. Illinois DOT,* 148 F.3d 800 (7th Cir. 1998)(same); *Ollie v. Titan Tire Corp.,* 336 F.3d 680 (8th Cir. 2003)(employer is not permitted to rely on its own misinterpretation of a physician's opinion regarding the individual's ability to perform the job at issue); *Lowe v. Alabama Power Co.,* 244 F.3d 1305, 1308 (11th Cir. 2001)(employer may not rely on inadequate doctor's evaluation to establish that plaintiff posed a direct threat). Any other construction would eviscerate the ADA and allow myths, fears, and stereotypes to deprive qualified people with disabilities of much needed employment opportunities.[23]

---

[23] This would undermine Congress's specific intent in passing the ADA. Congress specifically found that:

> [T]he continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

42 U.S.C. 12101 (9). It was exactly because employers like Red Star have historically denied jobs to people with disabilities on the ground that something might happen, whether or not it has a medical basis to support

D. The Third Circuit Correctly Affirmed The District Court's Direct Evidence Jury Instruction That Red Star's Adverse Action Against Mr. Taylor Was Based on His Medical Condition, But That Red Star Did Not Believe That Mr. Taylor was Qualified

Red Star asked the Third Circuit to order a new trial because the District Court instructed the jury as follows:

> "The parties agree that USF-Red Star's decision to keep Mr. Taylor off the job between March 15, 2001 and October 21, 2002, is because of his seizures. Therefore you need not decide whether USF-Red Star prevented Mr. Taylor from returning to work because of his medical condition. There is no dispute as to this fact."

JA 1412. However, the District Court also instructed the jury that Red Star

> "denies that it regarded Mr. Taylor as having a disability as defined by the ADA and PHRA, and further denies that it misclassified him as such. USF-Red Star also denies that it discriminated against Mr. Taylor when it refused to allow him to return to work. USF-Red Star contends that Mr. Taylor was not

---

its assumption that such risk is real, that Congress set forth a "direct threat" defense in the ADA. Congress specifically required employers attempting to preclude a person with a disability from working to prove more than the possibility that something untoward might happen. 42 U.S.C. § 12111 (3). Red Star, of course, never raised the direct threat defense and the Third Circuit did not consider it.

qualified to perform his job. JA1411.[24]

Under the guise of its complaint about this single jury instruction Red Star seeks Supreme Court review of issues which it never raised and which the Third Circuit did not consider. Red Star's attack on the Court's jury instruction is out of context, and assumes facts which find no support in the record.

First, Red Star's purported concern that the District Court's instruction, if applied broadly by other courts, would "eliminate" the "direct threat" defense" for other employers, amounts to a request for an advisory opinion. Petition at 23.

---

[24] Furthermore, the Court instructed the jury that "there is a dispute about whether Mr. Taylor had a disability ... and whether [he] was qualified to perform the essential functions of the position he desired. JA103

[25] Although Red Star provides the text of the direct threat defense in its Petition under "Statutory Provisions Involved," it did not cite it even once in its Brief to the Third Circuit. As the District Court pointed out, Red Star failed to raise its "business necessity" defense in its Rule 50 Motion and thereby waived it. See App. 26. Furthermore, Red Star's attack on the jury instruction is a thinly veiled attempt to resurrect the question whether operating a fork lift was an essential function of the dock worker position to which Mr. Taylor requested to return. Petition at 23. Red Star did not preserve that issue either.

Red Star did not raise that defense at trial and certainly never preserved in its appeal to the Third Circuit. 42 U.S.C. § 12113 (b).[25]

Second, as in every ADA case, the question before the Third Circuit was intensely factual: did the District Court's instruction, taken as a whole, clearly present the issues to the jury? The Third Circuit's conclusion that it did so was record-based and has no policy implications whatsoever for future ADA litigation. App. 6.

Red Star charges that the District Court's instruction and the Third Circuit's affirmance thereof is a matter of national moment because, according to Red Star, it prevented Mr. Taylor from returning to work only because "the doctors had not cleared him to operate a fork lift." There has never been any dispute, however, that Red Star demanded a unrestricted *medical* release from Mr. Taylor because of his *medical* condition and for no other reason. JA 8.[26] Likewise, it is undisputed that but for the seizures, there would have been no adverse action here and no lawsuit.[27] Moreover, before the Third Circuit Red Star complained that it refused to permit Mr. Taylor to return because he was not cleared to "return to work" and that he was not cleared to operate "a truck *or* a forklift." Appellant's Brief to the Third Circuit at 27-28. There has never been any dispute that driving a truck is entirely irrelevant

---

[26] JA8; 1592-3; 1600-6; 1664-5; 1676-80; 1703.

[27] *See* Memorandum and Order dated March 8, 2005, App. 29.

to whether Mr. Taylor was qualified to work on the dock at Red Star. Red Star's new and improved complaint, that it only deprived Mr. Taylor of his employment because he was not released to operate a fork lift, was not properly preserved.

The District Court gave the best and most neutral instruction which it was possible to give without siding with either party as to whether operating a fork lift or a truck was an essential function of the job which Mr. Taylor desired. Because there was disputed evidence as to whether operating a fork lift was an essential function of a dock worker, it would have been error for the District Court to have assumed that fact in its instruction to the jury. Additionally, Red Star indisputably rejected Mr. Taylor's request to return to work in any capacity whatsoever *even after* he had been fully released to operate *both* a fork lift *and* a truck, as well as numerous medical releases from Mr. Taylor which indicated that it was safe for him to handle manual freight on the loading dock, all because Red Star wanted an *unrestricted* medical release which would "resolve all the issues." JA345-46; 359; 494-96.[28]

The Third Circuit found that the instruction was fully adequate to fairly present the issue to the jury based on the record, and that decision should be affirmed. It would have been highly improper for the Court to have informed the jury that Red Star only kept Mr. Taylor off the job because he did

---

[28] This is a direct evidence case precisely because there was never any question that Mr. Taylor's physical condition was the basis for the employer's action. Red Star, in fact, never even requested a pretext instruction. Red Star's highest management officials acknowledged that Mr. Taylor continued to sit at home solely because Mr. Taylor "presented information which documented he had the seizures." JA456.

not have a release to return to the job he held or desired, when Red Star's own witnesses testified to the contrary. Moreover, the District Court twice informed the jury that Red Star believed that Mr. Taylor "was not qualified to perform his job". Thus, the Court's instruction could not have prejudiced Red Star.

E. There Is No Circuit Split Between The Third Circuit And The Second As to the Application of F.R.C.P. 52

Red Star's attack on the Third Circuit's treatment of Mr. Taylor's Motion for Supplemental attorneys fees is entirely frivolous. Red Star filed an untimely objection to the Plaintiff's Motion.[29] Thus, it has no standing to challenge the disposition of that motion here, just as it had no standing to challenge it before the Third Circuit.

Notwithstanding Red Star's ironic procedural posture, its Petition flagrantly omits any mention of the critical and dispositive time line which governs the outcome of this issue. Mr. Taylor's supplemental fee motion was filed on April 20, 2005 to recoup the fees and costs he incurred during the litigation of his original fee motion. The District Court did not issue a final order regarding Plaintiff's original fee motion until

---

[29] Plaintiff's Motion for Supplemental Fees was filed on April 20, 2005. Red Star did not respond until May 20, 2005, 16 days late. The District Court acknowledged that Red Star's response to Plaintiff's Motion was untimely, but decided the motion against Red Star because it was inconsistent with "common sense."

April 27, 2005. App.51.[30] Thus, the only reason that Mr. Taylor's supplemental fee motion was not filed within 14 days of "any order" is because it was filed seven days *before* the applicable order was issued. As the District Court aptly observed, this rendered Red Star's objections "groundless":

> How could Plaintiff submit a bill for the time spent preparing his fee petition before he completed its preparation and found out that it had been granted?

Id.

Moreover, the purported "Circuit split" Red Star attempts to construct from the Third Circuit's disposition of this case in comparison with the Second Circuit's decisions in *Weyant v. Okst,* 198 F.3d 311, 315 (2d Cir. 1999) and *Tancredi v. Metro Life Ins. Co,* 378 F.3d 220, 227-28 (2d Cir. 2004), *cert. denied,* 539 U.S. 942 (2003), causes one to suspect that its counsel has not read either case. The Third Circuit's treatment of the supplemental fees issue is entirely consistent with the Second Circuit's analysis in both *Weyant* and *Tancredi.* In *Weyant,* the Second Circuit explained that the fourteen day filing period for fee petitions, supplemental or otherwise, is not triggered until a final judgment has been rendered as to the proceedings in which the fees were incurred. *Accord Tancredi,* (plaintiff filed his initial fee petition twenty-one days after the

---

30 The District Court's June 8, 2005 Order is located in the Appendix to Red Star's Petition at 51-52. On March 8, 2005 the District Court issued a partial ruling as to the plaintiff's motion for attorneys fees, but withheld judgment as to portions of the fee request and solicited further documentation and briefing from the parties. Memorandum and order March 8, 2005, App. 44.

entry of judgment (7 days late) without excuse).[31] Here, the decision which ultimately determined the outcome of Mr. Taylor's fee motion was not issued until after he had filed his motion for supplemental fees. Like Red Star's other imaginary "Circuit splits", therefore, this one derives from cases with distinguishable facts but no dispute regarding governing legal principles.

Finally, even if there were any basis for Red Star's assertion that Mr. Taylor filed his motion for supplemental fees out of time, the District Court acknowledged that he did so within the time period the Court itself implied. App. 51-52; JA31.[32] Rule 54 (d)(2) specifically provides that fee motions may be filed after fourteen days from an order if "order[ed] by the court." The Third Circuit's decision does nothing more than acknowledge that Rule 54 specifically grants the District Courts the discretion to control the post-trial process so as to avoid piecemeal litigation. *Weyant,* 198 F.3d at 315.

---

[31] To evidence a "Circuit Split," Red Star also points to a recent, albeit unpublished, opinion of the Third Circuit, *Bernback v. Greco,* No. 05-4642, 2007 WL 108293 (3rd Cir. Jan. 16 2007). That case is entirely consistent with both *Weyant, Tancredi,* and the decision below. Indeed, the Third Circuit *followed Weyant* in that case. Id. at *7.

[32] Because the District Court, by its own admission, led Plaintiff's counsel to believe that he should file his motion for supplemental fees after the Court fully disposed of the original fee motion, any neglect would have been "excusable" pursuant to F.R.C.P. 54(d)(2).

CONCLUSION

For all the foregoing reasons, Red Star's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LORALYN McKINLEY
McKinley & Ryan, LLC
16 West Market Street
West Chester, PA 19382
(610) 436-6060

RALPH LAMAR
141 Spruce Lane
Collegeville, PA 19426
(610) 831-5181
Attorneys for Respondent, Edwin B. Taylor

DATE: April 12, 2007